

1 LAURA E. DUFFY
2 United States Attorney
3 RICHARD TOLLES
4 Assistant U.S. Attorney
5 State of California Bar No. 078948
6 Office of the U.S. Attorney
7 880 Front Street, Room 6293
8 San Diego, CA 92101-8893
9 Telephone: (619) 557-7479

10 Attorneys for Defendant
11 United States of America

12 UNITED STATES DISTRICT COURT

13 SOUTHERN DISTRICT OF CALIFORNIA

14 ELSA MANULID,) Case No. 10CV0721WQH(CAB)
15 Plaintiff,)
16 v.) MEMORANDUM OF POINTS AND
17) AUTHORITIES IN SUPPORT OF
18) MOTION TO DISMISS COMPLAINT
19)
20) DATE: October 18, 2010
21) TIME: 11:00 a.m.
22) CTRM: 4
23)
24) NO ORAL ARGUMENT UNLESS
25) REQUESTED BY THE COURT
26)
27)
28)

1 I

2 BACKGROUND AND PROCEDURAL HISTORY

3 On April 6, 2010, Plaintiff initiated this action naming as
4 Defendants, inter alia, the Sycuan Band of the Kumeyaay Nation and
5 Donald Weiss, M.D. Dr. Weiss is a physician-employee of the Sycuan
6 Tribal Government and provides medical services at the Sycuan Medical
7 Clinic. Dr. Weiss' position is funded under the Indian Self
8 Determination and Education Assistance Act (ISDEAA), 25 U.S.C.
9 § 450f(d).

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1 Plaintiff's Complaint alleges various employment-related claims
2 against the Sycuan tribal Defendants, and a common law battery claim
3 against Dr. Weiss. It is clear from the Complaint that the alleged
4 battery occurred while Dr. Weiss was providing medical services to
5 Plaintiff at the Sycuan Medical Clinic. Complaint, ¶¶ 12, 42-47.

6 With respect to the particular events alleged in the Complaint,
7 the United States Attorney for the Southern District of California,
8 through her designate, has certified pursuant to 42 U.S.C. § 233(c)
9 and 28 U.S.C. § 2679(d)(1) that Dr. Weiss was acting within the scope
10 of his employment at the Sycuan Medical Clinic, under an ISDEAA
11 funding agreement. A copy of the certification was filed with the
12 Court on or about September 9, 2010. Because Dr. Weiss was providing
13 medical services pursuant to an ISDEAA agreement, he is deemed an
14 employee of the Department of Health and Human Services, Public Health
15 Service, for purposes of suit for acts or omissions in the provision
16 of such services. See 25 U.S.C. § 450f(d).

17 Following the certification of Dr. Weiss, the United States was
18 substituted as the defendant in place of Dr. Gomez, as provided in 42
19 U.S.C. § 233(c) (suit against a PHS employee to be "deemed a tort
20 action brought against the United States") and 28 U.S.C. § 2679(d)(1)
21 (mandating substitution as to federal employees sued for acts within
22 the scope of federal employment). The medical claim alleged against
23 Dr. Weiss now proceeds as a tort action against the United States
24 under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, et seq.
25 See 42 U.S.C. § 233(a).

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1 Before commencing an FTCA suit, a claimant must pursue
2 administrative remedies by presenting an administrative claim within
3 two years after a claim accrues. See 28 U.S.C. §§ 2401(b), 2675(a).
4 No record exists that Plaintiff submitted an FTCA administrative claim
5 as required by the FTCA. See Exhibit 1, Hawkins Decl., ¶¶ 1-4.
6 Plaintiff's claim therefore must be dismissed for lack of subject
7 matter jurisdiction under Fed. R. Civ. P. 12(b)(1).^{1/}

II

ARGUMENT

10 THE COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE FTCA DUE TO
PLAINTIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

12 The United States is immune from suit save as it consents to be
13 sued. United States v. Mitchell, 445 U.S. 535, 538 (1980);
14 United States v. Testan, 424 U.S. 392, 399 (1976). The FTCA is a
15 limited statutory waiver of the United States' sovereign immunity from
16 suit. "Any such waiver must be strictly construed in favor of the
17 United States." Ardestani v. Immigration and Naturalization Service,
18 502 U.S. 129, 137 (1991). Therefore, any prerequisites to the filing
19 of a suit under the FTCA must be strictly observed. A jurisdictional
20 prerequisite to suing the United States in tort is the filing of an
21 administrative claim with the appropriate federal agency, as required
22 by 28 U.S.C. § 2675(a). Brady v. United States, 211 F.3d 499, 502
23 (9th Cir. 2000); Cadwalder v. United States, 45 F.3d 297, 300 (9th
24 Cir. 1995). As set forth in 28 U.S.C. § 2675(a):

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27 ^{1/} The FTCA contains a savings provision for actions in which the
28 United States is substituted in place of an individual defendant.
Section 2679(d)(5) of 28 U.S.C. provides sixty days from dismissal to
present the required administrative claim.

1 (a) An action shall not be instituted upon a claim against
2 the United States for money damages for injury or loss of
3 property or personal injury or death caused by the
4 negligent or wrongful act or omission of any employee of
5 the Government . . . unless the claimant shall have first
6 presented the claim to the appropriate Federal agency and
his claim shall have been finally denied by the agency in
writing. . . . The failure of an agency to make final
disposition of a claim within six months after it is filed
shall. . . be deemed a final denial of the claim for
purposes of this section.^{2/}

7 Plaintiff's FTCA claim must be dismissed because she has not pled
8 that she complied with the FTCA's administrative exhaustion
9 requirement before bringing this action, and because the evidence
10 before the Court proves that she filed no such claim.

11 A plaintiff has the burden to allege that subject matter
12 jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co., 511 U.S.
13 375, 377 (1994). At the pleading stage, this burden is met by
14 pleading sufficient allegations to show a proper basis for the court
15 to assert subject matter jurisdiction. McNutt v. Gen. Motors
16 Acceptance Corp., 298 U.S. 178, 189 (1936); Fed. R. Civ. P. 8(a)(1).

17 A plaintiff suing in federal court must show in his
18 pleading, affirmatively and distinctly, the existence of
19 whatever is essential to federal jurisdiction, and, if he
does not do so, the court, on having the defect called to
its attention ... must dismiss the case, unless the defect
can be corrected....

21 Tosco Corp. v. Cmtys for a Better Env't., 236 F.3d 495, 499 (9th Cir.
22 2001), abrogated on other grounds by Hertz Corp. v. Friend, 130 S. Ct.

24 ²⁴ Once an FTCA claim is presented, the involved federal agency
25 has six months to act. See 28 U.S.C. § 2675(a). A lawsuit which is
26 commenced prior to the presentation of an FTCA administrative claim
27 to the appropriate agency is premature and must be dismissed. Jerves
28 v. United States, 966 F.2d 517, 519 (9th Cir. 1992). A premature
complaint cannot be cured by presenting an FTCA administrative claim
to the agency after suit has been filed. McNeil v. United States, 508
U.S. 106, 110-13 (1993). Rather, a premature suit must be dismissed
and refiled after the presentation of an administrative claim and
either its subsequent denial, or alternatively, the expiration of the
six-month statutory period afforded by 28 U.S.C. § 2675(a).

1 1181 (2010). Plaintiff's complaint contains no allegation concerning
 2 the presentation of an FTCA administrative claim. Accordingly, she
 3 fails to allege an important prerequisite to subject matter
 4 jurisdiction and dismissal is required.

5 As discussed in the Declaration of Daretia Hawkins, an attorney
 6 at the Office of the General Counsel, Department of Health and Human
 7 Services (HHS), any claim presented by Plaintiff to HHS directly, or
 8 to the Sycuan Medical Clinic, would have been entered into the HHS
 9 Claims Office computerized database. Ex. 1 at ¶ 3. However, no
 10 record of any administrative tort claim from Plaintiff has been
 11 located in the computerized database maintained by HHS. Id. at ¶ 4.
 12 Furthermore, Ms. Hawkins' staff contacted the Sycuan Medical Clinic
 13 and was advised that they had no record of any FTCA administrative
 14 claim presented by Plaintiff.^{3/} Id.

15 This Court may consider evidence outside the complaint in
 16 connection with a challenge to its subject matter jurisdiction. See
 17 Gotha v. United States, 115 F.3d 176, 179 (3rd Cir. 1997). When such
 18 evidence is presented, "'[n]o presumptive truthfulness attaches to
 19 plaintiff's allegations, and the existence of disputed material facts
 20 will not preclude the trial court from evaluating for itself the
 21 merits of jurisdictional claims.'" Augustine v. United States, 704
 22 F.2d 1074, 1077 (9th Cir. 1983) (citation omitted). Because Plaintiff
 23 failed to present an administrative claim before commencing this suit,
 24 the action is premature and must be dismissed for lack of subject
 25 matter jurisdiction.

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 28 ^{3/} As held in Estrella v. United States, 2000 WL 33348249, *3
 (W.D. Tex.), delivery of a claim to a health center, such as the
 Sycuan Medical Clinic is legally insufficient in any event.

1 III
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CONCLUSION

3 Plaintiff has not complied with the administrative claim
4 requirements of the FTCA. She therefore has failed to satisfy the
5 FTCA's jurisdictional prerequisites and Plaintiff's claim against the
6 United States must be dismissed.

7 DATED: September 9, 2010
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9 LAURA E. DUFFY
10 United States Attorney
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12 s/ Richard Tolles
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14 RICHARD TOLLES
15 Assistant U.S. Attorney
16 E-Mail: Richard.Tolles@usdoj.gov
17 Attorneys for Defendant
18 United States of America
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